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MATERIALMEN'S LIEN; PRIORITY OVER MORTGAGEHOLDER

This Memo addresses some of the issues involved in a materialmen's lien taking priority over a previously filed mortgage pursuant to T.C.A. § 66-11-108.

Even if a mortgage is recorded prior to a notice of lien and before visible commencements of operation (see T.C.A. § 66-11-104), T.C.A. § 66-11-108 may enable a lien holder to take priority over a mortgage. T.C.A. § 66-11-108 states as follows:

Priority over mortgage. – If the contract for an improvement is made with a mortgagor, and the lienor has served the mortgagee with written notice of the same by certified or registered mail before the work has begun or materials furnished by the lienor, and the mortgagee gives written consent thereto by certified or registered mail, the lien provided by this chapter to that lienor shall have priority over the mortgage; and, if the mortgagee fails to serve a written objection by certified or registered mail within ten days after receipt of the notice, the mortgagee's consent shall be implied; provided, that the person giving notice shall include a name and return address to which the lien objection shall be served. If notice is not served in accordance with the provisions of this section, then the lien shall not have priority over a mortgage otherwise entitled to priority over the lien under applicable law.

T.C.A. § 66-11-108 (2010). This law was formally codified in Shannon's Code and has been in full force since 1858. However, as recently as this year, it has been recognized as still in force and as an effective means of changing lien priority.

A lien is normally subordinate to a mortgage if the mortgage is recorded before the lien attaches. However, if the mortgagee is provided written notice pursuant to T.C.A. § 66-11-108 but fails to object within ten days from receipt of notice from the claimant, the lien takes priority over the mortgage. *Kingsport Brick Corp v. Bostwick*, 235 SW 70 (1921); *Parker-Harris Co v. Tate*, 188 SW 54 (Tenn. 1916).



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Under this statute, “[a] lien obtain priority over a mortgage existing prior to visible commencement of operations if mortgagee gives written notice of the mortgagor/lien holder contract and no written objection is tendered within ten days after receipt of such notice.” Getz, Joseph T. and Michael I. Less, Tennessee Practice Series, Construction Law Handbook, § 10:15(2010). Additionally, “[n]o particular form of written notice is prescribed by the statute, but the mortgagee must have written notice of the contract by certified or registered mail *before* the work is commenced.” Id. (emphasis in original). Unless this procedure of providing notice before work has begun is followed, the “lien is subordinate to that of the mortgage.” *In re Premier Hotel Dev. Group*, 271 B.R. 813 (Bankr.E.D.Tenn.2002).

If you wish to discuss materialmen’s lien or other construction related issues with respect to your business, Henry & McCord would be happy to provide such advice. You may contact Clifton Miller at (931) 455-9301 to schedule an appointment.

